

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

**THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA**

FRIDAY, THE 14TH SEPTEMBER 2007 / 23RD BHADRA 1929

MFA.No. 76 of 2003(B)

WCC.99/1999 of W.C.C., KANNUR

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APPELLANT: 2ND OPP.PARTY:

**BRANCH MANAGER,
NEW INDIA ASSURANCE COMPANY LTD., 10/894,
SOUTH BAZAR, PAYYANNUR.**

BY ADV. SRI.RAJAN P.KALIYATH

RESPONDENTS/APPLICANT AND OPP.PARTY-1:

- 1. K.P.KRISHNAN, S/O. KUNHIRAMAN,
MOOSHARI KOVVAL, POST KUNHIMANGALAM, KANNUR.**
- 2. K.SUBAIR, S/O. AHAMMED HAJI,
NOOR MAHAL, PERUMBA, PAYYANNUR.**

**BY ADV. SRI.A.MOHAMED MUSTAQUE FOR R1
SRI.M.SANTHOSHKUMAR
SRI.C.MURALIKRISHNAN (PAYYANUR) FOR R2**

**THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD
ON 14/09/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

J.B. KOSHY & K.HEMA, JJ.

M.F.A.NO.76 OF 2003 (B)

Dated this the 14th day of September, 2007

JUDGMENT

Koshy,J.

Appellant Insurance company questions the award of the Commissioner for Workmen's Compensation. An auto driver during the course of employment met with an accident and as a result of the accident, he suffered the following injuries:

"Fracture on the frontal bone, Cut over lip (upper), Cut over lower lip, Fracture on mandible, Nosal bleeding, Maxilla mobile, palpable, Fracture of maxilla, Leforte-li fracture, Maxilla facial injury, leforts-li injury, Missing teeth, Cerebral laceration, Multiple intra cerebral bone fragmented."

Ext.A14 disability certificate produced shows that

"M.K.P.Krishnan, aged 32 years, was admitted to the hospital on 12th November, 1998 with the history of RTA and discharged on 2nd December 1998. He had compound depressed fracture frontal bone with cerebral contusion. He has anti convulsions from the time of injury. He still gets occasional attacks of fits and he is unfit to drive Motor vehicles."

When that was produced, Insurance company contended that the assessment was not correct, and therefore, he should be sent for medical examination before the Medical Board. Accordingly the Workmen's Compensation Commissioner send him to the Medical Board and Board certified functional disability as 100%. Ext.X1 certificate reads as follows:

"We, the Chairman and Members of the Medical Board District Hospital, Kannur constituted on 24.10.2001, have this day examined Sri.A.K.Krishnan, Kariyalpara House, Mooshari Kovval, Kunhimangalam P.O., Kannur District, and found that he is suffering from Recurrent Epilepsy following brain injury due to RTA on 12.11.1998. He had compound and comminuted deprived fracture of frontal bone in the middle with eye level lacerations. He requires life long treatment for epilepsy. Thus physical disability is 5% (Five percent) and functional disability (Disorder) is 100%. He is unfit to work as a driver."

Tribunal has granted compensation for 100% loss of earning capacity. It is the contention of the Insurance company that Commissioner ought have considered his physical disability and also should consider that he may be able to do some other job. Admittedly the injuries suffered by the auto driver was not scheduled injuries and in case of non-scheduled injuries,

compensation can be calculated under Section 4(1)(ii) of the Workmen's Compensation Act which is as follows:

- (ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;

Therefore Commissioner cannot arbitrarily assess the compensation. Commissioner has to assess the loss of earning capacity on the basis of the certificate of a qualified Medical Practitioner. Here the medical practitioner as well as the Medical Board certificate shows that functional disability is 100%. Physical disability is different from loss of earning capacity. In this connection, we refer to the Apex Court decision in **Pratap Narain Singh Deo v. Shrinivas Sabata and another (AIR 1976 SC 222)**. Claimant was 34 years of age. In view of the epilepsy and other consequence of accident, he may not be able to work as a driver and to get any other job is also difficult. Since the loss of earning capacity

assessed by the Commissioner is not arbitrary but based on a certificate of a qualified medical practitioner (Medical Board), we are of the opinion that no interference is required and hence the appeal is dismissed.

J.B.KOSHY, JUDGE

K. HEMA, JUDGE

prp

**J.B. KOSHY AND
K.HEMA,JJ.**

M.F.A.NO.76/2003

J U D G M E N T

Dated:14th September, 2007